

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ALEJANDRO CASCO

Claimant

VS.

ARMOUR SWIFT ECKRICH

Self-Insured Respondent

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Docket No. 262,768

ORDER

Respondent appealed the June 30, 2004 Award entered by Administrative Law Judge Bryce D. Benedict. The Board heard oral argument on December 7, 2004.

APPEARANCES

Gary M. Peterson of Topeka, Kansas, appeared for claimant. Mark E. Kolich of Lenexa, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

There are no changes to the record or stipulations listed in the Award.

ISSUES

Claimant alleges he injured both upper extremities and shoulders while working for respondent. The parties stipulated June 8, 2000, was the appropriate date of accident for these claimed injuries.

In the June 30, 2004 Award, Judge Benedict concluded claimant's right upper extremity injury was the natural and probable consequence of his left upper extremity injury. Consequently, the Judge awarded claimant permanent disability benefits under K.S.A. 1999 Supp. 44-510e rather than under the scheduled injury statute, K.S.A. 1999 Supp. 44-510d. The Judge held claimant sustained a 19 percent whole person functional impairment, a 39 percent task loss, a 100 percent wage loss, and a 69.5 percent work disability.¹

¹ A permanent partial general disability greater than the whole person functional impairment rating.

Respondent contends Judge Benedict erred. Respondent argues claimant sustained two scheduled injuries to the upper extremities and, therefore, should receive permanent disability benefits under the schedules of K.S.A. 1999 Supp. 44-510d rather than under K.S.A. 1999 Supp. 44-510e. In its brief to the Board, respondent asserts “where performance of the job is responsible for the onset of complaints, the injury results from a new accident and the secondary disability rule does not apply.”² In the alternative, respondent argues claimant is not entitled to receive a work disability as he failed to timely respond to respondent’s offer of an accommodated job.

Accordingly, respondent requests the Board to grant claimant permanent disability benefits under K.S.A. 1999 Supp. 44-510d for a 27 percent functional impairment to the left shoulder and for a six percent functional impairment to the right shoulder. In the alternative, respondent requests the Board to find that claimant’s permanent partial general disability under K.S.A. 1999 Supp. 44-510e is limited to his 19 percent whole person functional impairment rating.

Conversely, claimant contends the June 30, 2004 Award should be affirmed. Claimant contends he is entitled to receive permanent disability benefits under K.S.A. 1999 Supp. 44-510e, as opposed to two scheduled injuries under K.S.A. 1999 Supp. 44-510d, because the evidence is uncontradicted he sustained an overuse injury to the right shoulder due to the left shoulder injury. Moreover, claimant argues he has made a good faith effort to find work following his injury and that respondent’s five-day deadline to report to an accommodated job was not reasonable under the circumstances.

The only issue before the Board on this appeal is the nature and extent of claimant’s injury and disability.

FINDINGS OF FACT

After reviewing the entire record and considering the parties’ arguments, the Board finds:

1. Respondent employed claimant in one of its meat processing plants. While tying sausages and placing them on a chain, which was part of claimant’s regular job with respondent, claimant began experiencing symptoms in his left upper extremity. According to claimant, the job required claimant to work above shoulder level. The parties stipulated June 8, 2000, was the appropriate date of accident for purposes of this claim.

² Respondent’s Brief at 5 (filed Aug. 5, 2004).

2. Claimant reported his left upper extremity symptoms to the company nurse and was referred for medical treatment. After first seeing another doctor, claimant began treating with Dr. Larry F. Frevert, who performed surgery on claimant's left shoulder in 2001 and again in February 2002. The doctor recommended a third left shoulder surgery, which was scheduled for early 2003, that claimant declined.
3. Following the left shoulder surgeries, however, claimant began to experience similar symptoms in his right upper extremity. Claimant testified that following his left shoulder surgeries he returned to work for respondent, performing his work with his right arm.

The problem was that because I was having discomfort on my left arm, my left shoulder, I started using the right.

. . . .

Since I had the -- my restrictions on my left arm, then I had to do all the work with my right arm. I was doing the work -- I was having to do repetitive movement with my right arm -- with my right hand in order to tie the meat. I then had to -- after that container would fill up, I then had to pick it up with my right arm and take it to a specific place. I would hold it with my right arm and then put it against my side in order to take it to a specific place.³

4. After a preliminary hearing in February 2003, claimant consulted Dr. Frevert for the right upper extremity problems. And in May 2003, Dr. Frevert operated on claimant's right shoulder. According to claimant, his right upper extremity symptoms began in August 2002.
5. On October 16, 2003, Dr. Frevert released claimant from treatment with medical restrictions. The next day claimant presented those restrictions to respondent, which advised claimant the company did not have any job for him. Claimant testified, in part:

I took the restrictions to Ms. Pauling. She said, I do not have any employment for you.

. . . .

³ R.H. Trans. at 12-13.

And we will arrange this with your attorney.⁴

6. Without funds for rent and other living expenses, one week later claimant traveled to Maryland to live with his son.
7. On November 5, 2003, respondent's attorney wrote claimant's attorney. That letter instructed claimant to report to work on November 10, 2003, or that he would be considered to have voluntarily terminated his employment. But claimant did not receive the letter in Maryland until November 12, 2003. Upon receiving the letter, claimant telephoned his attorney and advised that he did not have the funds to immediately return to Kansas. Claimant testified, in part:

Q. (BY MR. COOPER) After you received the letter November 12, 2003 about coming back for a job on November 10, did you actually come back to Kansas and ask for a job?

A. (Claimant) I received the letter on November the 12th saying I needed to report to work on November the 10th and it was impossible. But in order to return back for a job, I had to have money. I then called Cooper's office, my attorney, and let him know that I could not return.

Q. Okay. And did you get back in to Conagra [respondent] after that?

A. Yes. Since I purchased an economical [bus] pass ticket, I returned -- I returned to work on November the 24th of the year 2003.⁵

But when claimant returned to Kansas and reported for work on November 24, 2003, respondent advised it did not have a job for claimant as he had failed to report within the allotted period.

8. When claimant testified at the April 29, 2004 regular hearing, he remained unemployed despite looking for work in Maryland. At the hearing, claimant introduced a list of 87 job contacts with potential employers he had made between December 8, 2003, and April 26, 2004.

⁴ *Id.* at 14.

⁵ *Id.* at 16.

9. The parties stipulated the job that respondent offered claimant in the November 5, 2003 letter would have paid a wage comparable to what claimant was earning at the time of his accidental injury.⁶
10. Dr. Sergio Delgado, who is a board-certified orthopedic surgeon, was the only medical expert to testify in this claim. The doctor saw claimant in January, April and November 2003. At the time of the last examination, claimant had undergone two surgeries on his left shoulder and one surgery on the right shoulder, and had declined a third surgery on the left.
11. Dr. Delgado rated claimant as having a 27 percent functional impairment to the left upper extremity and a six percent functional impairment to the right upper extremity, which combined for a 19 percent functional impairment to the whole person under the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). The doctor also concluded claimant should limit repetitive pushing or pulling to no more than 50 pounds, limit occasional pushing or pulling to no more than 70 pounds, limit occasional lifting from the floor to no more than 40 pounds, limit lifting from the waist to overhead to no more than five to 10 pounds occasionally, and limit all repetitive lifting from the waist to overhead.
12. The doctor agreed claimant's right shoulder problems were mainly due to overuse and compensating for the left shoulder.⁷ The doctor testified, in part:

Q. (Mr. Kolich) Okay. Now, Doctor, with regard to the right shoulder I think you've indicated that you feel that that shoulder became injured because he was over compensating [*sic*] for the other shoulder. Is that true?

A. (Dr. Delgado) That is very frequently seen where when there's limitation of motion, weakness or pain, the other shoulder is overloaded if he continues to do the same activities as before or similar to them.

Q. And when you say same activities, you are specifically referring to his work activities, is that true?

A. Yes.

⁶ Stipulation (filed June 7, 2004).

⁷ Delgado Depo. at 9.

Q. Because would it be fair to assume if he wasn't doing the work activities, there would be nothing to cause an injury to that right shoulder, would there?

A. That would be correct.

Q. When he testified back in February of 2003, he was asked about that, and his -- well, I'll read you the question and the answer. The question is on Page 23, "And did I understand your testimony earlier the reason your right shoulder became a problem was you weren't even using your left arm because of your left shoulder problem. You were doing everything with your right arm," and his answer was "Yes." Would that be consistent with what he told you?

A. Yes.

Q. And of course, Doctor, if he wasn't using his left arm at all, there was no -- that wouldn't cause any aggravation or the continued aggravation of the left shoulder, would it?

A. It should not.⁸

13. Claimant's attorney hired vocational expert Monty Longacre to interview claimant and compile a list of the work tasks claimant performed in the 15-year period before his bilateral upper extremity injuries. Dr. Delgado reviewed that task list and concluded claimant had lost the ability to perform 10 of the 20 tasks, or 50 percent. Dr. Delgado reviewed a list of claimant's former work tasks as prepared by respondent's vocational expert, Terry Cordray. The record is not clear, but it appears Dr. Delgado determined claimant lost the ability to perform at least four of the 15 tasks on that list, or approximately 27 percent, due to his bilateral upper extremity injuries.
14. Both vocational experts testified in this claim. According to Mr. Longacre, claimant retains the ability to earn \$6 per hour. But Mr. Cordray believes claimant retains the ability to earn \$7 per hour.

⁸ *Id.* at 21-22.

CONCLUSIONS OF LAW

In *Jackson*,⁹ the Kansas Supreme Court held that every natural consequence that flows from an injury, including a new and distinct injury, is also compensable under the Workers Compensation Act if it is a direct and natural result of the initial injury. But that general rule was clarified in *Stockman*,¹⁰ which held that the *Jackson* rule did not apply when a worker sustained a new and separate accident:

The rule in *Jackson* is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury such as occurred in the instant case. The rule in *Jackson* would apply to a situation where a claimant's disability gradually increased from a primary accidental injury, but not when the increased disability resulted from a new and separate accident.¹¹

And whether a new and distinct injury is a natural and direct consequence of an initial injury or whether the new and distinct injury resulted from a new and separate accident is a question of fact to be decided on a case-by-case basis.

The Board finds the evidence is overwhelming that claimant sustained a new and separate accident that resulted in claimant's right shoulder injury. Claimant's testimony is uncontradicted that he returned to work for respondent using only his right arm as he was protecting the left upper extremity. Moreover, Dr. Delgado's testimony is uncontradicted that claimant's right shoulder was injured by the work he was performing for respondent while only using his right arm. There is no evidence claimant sustained simultaneous injury to his shoulders. Nor is there any evidence, medical or otherwise, which indicated claimant's activities away from work contributed to the right shoulder injury.

Considering the record presented, the Board finds and concludes claimant's right shoulder injury resulted from a new and separate accident due to the repetitive work activities claimant was performing with his right arm only. Accordingly, claimant is entitled to receive permanent disability benefits for two injuries as provided by the schedules in K.S.A. 1999 Supp. 44-510d.

The Board is mindful the evidence establishes claimant's right shoulder injury occurred due to overcompensating for the left upper extremity injury. But that evidence is not determinative as the appropriate question is not whether the injuries are somehow

⁹ *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

¹⁰ *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 505 P.2d 697 (1973).

¹¹ *Id.* at 263.

related. The controlling issue, instead, is whether a new accident has occurred. And this record establishes claimant returned to work for respondent performing repetitive work with his right arm only, which caused the right upper extremity injury.

The June 30, 2004 Award should be modified. As provided by K.S.A. 1999 Supp. 44-510d, claimant is entitled to receive disability benefits for a 27 percent permanent partial disability to the left upper extremity at the shoulder level and disability benefits for a separate six percent permanent partial disability to the right upper extremity at the shoulder level. The right shoulder injury occurred after the left shoulder injury and, therefore, has a different accident date. The parties, however, stipulated that June 8, 2000, was the appropriate accident date for this claim. Accordingly, that date will be used for both upper extremity injuries.

AWARD

WHEREFORE, the Board modifies the June 30, 2004 Award, as follows:

Alejandro Casco is granted compensation from Armour Swift Eckrich for a June 8, 2000 accident and resulting disability. Based upon an average weekly wage of \$481.94, Mr. Casco is entitled to receive 46.14 weeks of temporary total disability benefits at \$321.31 per week, or \$14,825.24, plus 48.29 weeks of permanent partial disability benefits at \$321.31 per week, or \$15,516.06, for a 27 percent permanent partial disability to the left upper extremity at the shoulder level, making a total award of \$30,341.30, which is all due and owing less any amounts previously paid.

Alejandro Casco is granted compensation from Armour Swift Eckrich for a June 8, 2000 accident and resulting disability. Based upon an average weekly wage of \$481.94, Mr. Casco is entitled to receive 13.5 weeks of permanent partial disability benefits at \$321.31 per week, or \$4,337.69, for a six percent permanent partial disability to the right upper extremity at the shoulder level, making a total award of \$4,337.69, which is all due and owing less any amounts previously paid.

The Board adopts the remaining orders set forth in the Award that are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of January 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Gary M. Peterson, Attorney for Claimant
Mark E. Kolich, Attorney for Respondent
Bryce D. Benedict, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director